SUPREME COURT, U. S.

Supreme Court, U. S.
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No. 73-240

In the Supreme Court of the United States

OCTOBER TERM, 1973

HARDIE CHRISTOPHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
JEROME M. FEIT,
JUDITH A. METZNER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1973. An untimely application for an extension of time within which to file the petition for a writ of certiorari was returned by the Court. The petition was filed on August 4, 1973, and is untimely under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing at trial to reconsider its denial of a pretrial motion to suppress

evidence and to order disclosure of the identity of a government informant.

2. Whether the government failed to prove the chain of custody of physical evidence.

3. Whether petitioner was convicted solely on the basis of his uncorroborated, extrajudicial admissions.

4. Whether the conduct of the trial judge deprived petitioner of a fair trial.

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on a two-count indictment charging the unlawful possession of heroin with intent to distribute, and a sale of heroin to one Quincy Silver, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2), and a fine of $5,000. The court of appeals affirmed by order (Pet. App. 53).

Petitioner was arrested during a search of his home, pursuant to a search warrant, which resulted in the discovery of two packages of heroin in prescription envelopes, a quantity of empty prescription envelopes, and measuring paraphernalia (Tr. 12, 20, 22, 28). Immediately prior to the search, surveilling officers observed four men in an automobile parked directly across the street from petitioner's house (Tr. 10). The car sped away after the officers proceeded to execute the search warrant. Following a chase, during which the occupants of the car threw two packages out of the window, the occupants were apprehended and the packages retrieved. Confronted at his home

with these packages, petitioner identified them as two ounces of heroin, which he had just sold to "Dallas" (Quincy "Dallas" Silver), one of the occupants of the automobile (Tr. 15-16). The heroin was packaged similarly and was approximately equal in purity to that found in petitioner's home (Tr. 19, 96-97). In addition, petitioner told the officers that a large amount of cash found in his home represented the proceeds of "dealing" (Tr. 14).

ARGUMENT

1. Petitioner contends that the district court improperly refused to consider at trial renewed objections to the search warrant, the validity of which had been sustained at a pretrial hearing. At the hearing, two weeks prior to trial, petitioner had argued, without submitting any supporting evidence, that the warrant application (Pet. App. 30-33) was insufficient on its face, and that it failed to establish the reliability of the unnamed informant. Petitioner also contended that the informant's identity should have been disclosed (Transcript of May 30, 1972, pp. 5-7). In denying the motions, the court found the affidavit sufficient and ruled that the informant's identity need not be disclosed, since his statements were not probative of petitioner's guilt of the offense charged (*id.* at 16-18).

At trial, for the first time, petitioner sought to attack the accuracy of the allegations contained in the search warrant application, and he here contends that the trial court erred in declining to entertain such a challenge. Under Rule 41(e) of the Federal Rules of Criminal Procedure, petitioner was required to raise in the pretrial proceeding any grounds known to him for the suppression of evidence obtained pursuant to the search warrant. *Jones* v. *United States,* 362

U.S. 257, 264; see also *Nardone* v. *United States*, 308 U.S. 338, 342. Since petitioner failed at the pretrial hearing to present evidence challenging the accuracy of the affidavit on the grounds pressed at trial, and since he has not alleged here or below that the claimed inaccuracies were unknown to him prior to trial, he must be deemed to have waived his objections.

In any event, petitioner has not shown any inaccuracy in the application. It is petitioner's contention (Pet. 17-18) that the affidavit erroneously states (Pet. App. 32-33) that two persons whose automobiles were seen near petitioner's house had drug-related arrests, and that the affiant-officer had personally witnessed various incidents related in the affidavit. However, the trial testimony of the affiant, Agent Finnegan of the Bureau of Narcotics and Dangerous Drugs ("BNDD"), casts no doubt on the trustworthiness of statements in the warrant application. The Agent maintained on cross-examination that he had personally checked the criminal records of the two persons named in the affidavit, and that drug-related arrests of each were on file with local police (Tr. 38-39, 61-63). He also pointed out that the affidavit did not allege that he, personally, had witnessed all of the events described (Tr. 60). Moreover, the truth of one of the challenged allegations was corroborated by the testimony of a defense witness (Tr. 276-279).[1]

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[1] *United States* v. *Upshaw*, 448 F. 2d 1218 (C.A. 5), certiorari denied, 405 U.S. 934, upon which petitioner relies, does not support his position. In *Upshaw*, it was established at a pretrial hearing that the affidavit was in all material respects erroneous, leaving only the affiant's belief that a crime was being committed. The court of appeals did not decide whether the defendants were entitled to a hearing on the truth of their allegations, but merely stated that a suppression motion was improperly denied where

Petitioner also complains that the affidavit fails to recite that the undisclosed informant was "reliable". It is unnecessary, however, for the affiant to state that his source is "reliable" or "credible", as long as the affidavit provides a basis for the magistrate's conclusion that the information is worthy of belief. *United States* v. *Harris,* 403 U.S. 573, 579-580. The affidavit in the instant case asserted that the affiant had received information from the informant on "more than 4 occasions during the past 2 1/2 years, and as recently as one month ago, which information has resulted in the indictment of over 4 individuals in drug related cases" (Pet. App. 30-31). On these facts, the magistrate was justified in believing the information presented in the instant application to have a reliable source.

Petitioner, moreover, was not entitled to disclosure of the identity of the informant whose statements to Agent Finnegan furnished the primary showing of probable cause in the warrant application. It is settled that creditable hearsay statements may be used in an affidavit for a warrant if they are sufficient to support a magistrate's conclusion that probable cause exists, and in such circumstances, the identity of the informant need not be disclosed. *Jones* v. *United States, supra,* 362 U.S. at 269-272; see *McCray* v. *Illinois,* 386 U.S. 300.

The reasons advanced by petitioner to compel disclosure of the informant, in any case, are not persuasive. The fact that the warrant application was based on the informant's advice that "Hardie Christopher"

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the court was made aware at a pretrial hearing that errors in the affidavit "struck at the heart of the affidavit's showing of probable cause." *Id.* at 1222.

had been in possession of two pounds of heroin does not justify questioning the informant as to which "Hardie Christopher" was meant. The application was for a warrant to search the premises, not to arrest an individual, and it is therefore immaterial who was in possession of narcotics two days prior to the search. Since the confidential information related only to probable cause for the search, and not to petitioner's guilt of the offenses charged, he was not entitled to disclosure. *McCray* v. *Illinois, supra,* 386 U.S. at 309.[2]

For the first time it is contended that petitioner may have been entitled to an entrapment defense on the count charging him with sale of the heroin, if the informant proved to be Quincy "Dallas" Silver, the purchaser of the drug. However, by denying that he had ever made such a sale (Tr. 316), petitioner was precluded from raising the defense of entrapment. *United States* v. *Rodrigues,* 433 F. 2d 760, 761 (C.A. 1), certiorari denied, 401 U.S. 943; *Canal Zone* v. *Risbrook,* 454 F. 2d 725 (C.A. 5); *United States* v. *Shameia,* 464 F. 2d 629 (C.A. 6), certiorari denied, 409 U.S. 1076; *United States* v. *Carter,* 326 F. 2d 351, 353 (C.A. 7); *United States* v. *Mehciz,* 437 F. 2d 145, 149 (C.A. 9), certiorari denied, 402 U.S. 974. Contra, *Hansford* v. *United States,* 303 F. 2d 219, 221 (C.A. D.C.).

2. Petitioner contends that the government failed to establish an unbroken chain of custody of the heroin

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[2] We note, in any event, that petitioner evidently is known as "Hardie Christopher", whereas his son calls himself "Hardie Christopher, Jr." (Tr. 291, 309-310). Petitioner also expressed doubt that the heroin found in the house could have belonged to his son (Tr. 328).

and that the physical evidence should therefore not have been admitted into evidence. However, the government need not establish a complete and exclusive chain of custody, but only an improbability that the evidence had been misidentified or altered. *United States* v. *McFadden,* 458 F. 2d 440 (C.A. 6), certiorari denied, 410 U.S. 911; *United States* v. *DeLarosa,* 450 F. 2d 1057, 1068-1069 (C.A. 3), certiorari denied *sub nom. Baskin* v. *United States,* 405 U.S. 927; *United States* v. *Robinson,* 447 F. 2d 1215 (C.A. D.C.). Petitioner may prevail only by a showing of such tampering as would establish abuse of discretion by the trial court in admitting the evidence. *United States* v. *DeLarosa, supra,* 450 F. 2d at 1069; *Gallego* v. *United States,* 276 F. 2d 914 (C.A. 9). Otherwise, the objection goes only to the weight of the evidence, and not to its admissibility. *United States* v. *Graham,* 464 F. 2d 1073, 1076 (C.A. 5).

The evidence in the instant case was ample to enable the trier of fact to conclude beyond a reasonable doubt that the evidence which was the subject of the laboratory analysis was the same evidence discovered at the time of the search of petitioner's home. The BNDD laboratory chemist[3] testified that the exhibits which he had analyzed, and which he identified at trial, had arrived at his laboratory by registered mail, in a sealed condition, and that he had broken the seal. The signature of the person who had mailed the envelope was on the back of the lock-seal envelope (Tr. 72, 78). Two of the same exhibits were identified by a Detroit

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[3] The government called the chemist only to testify that the exhibits were packaged in prescription envelopes (Tr. 75). The parties had previously stipulated to the admissibility and contents of the laboratory reports (Tr. 7-8).

police officer as the objects which he had retrieved from the fleeing automobile in which Quincy Silver was riding, and which he had initialed and turned over to BNDD Agent Mahon (Tr. 104-106). Agent Mahon identified those two exhibits and certain exhibits found in petitioner's house as articles which he had initialed and placed in a lock-seal envelope, which he had then signed and transmitted by registered mail to the BNDD laboratory (Tr. 130-134). The agent had obtained positive results in chemical field tests for heroin conducted on one of the packages found in the house and one thrown from the automobile (Tr. 126, 130-131).

3. Petitioner's contention that he was improperly convicted of the sale of heroin to Quincy "Dallas" Silver solely on his own, uncorroborated, extra-judicial confession is without merit. The corroboration required to support the admissions of an accused is only that evidence which "supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Opper* v. *United States,* 348 U.S. 84, 93. The facts of the instant case provide ample corroboration for petitioner's admission during the search of his home that he had just sold two ounces of heroin to "Dallas" for two hundred dollars apiece (Tr. 16). Two packages were retrieved from the street after having been thrown from the automobile in which Quincy "Dallas" Silver was riding when apprehended (Tr. 15). That automobile had been parked directly across the street from petitioner's house for at least fifteen minutes before the warrant was executed (Tr. 10-11). The narcotics thrown from the car were approximately equal in purity to the heroin found in petitioner's house, and were packaged in prescription envelopes identical to those found in petitioner's house (Tr. 19, 96-97). A large amount of cash was found in a bedroom used by

petitioner, and he admitted that the money consisted of proceeds from the sale of drugs (Tr. 14). These acts substantiated the trustworthiness of petitioner's admissions and warranted the submission to the court as trier of fact of the count alleging a sale of heroin to Quincy Silver.

4. Petitioner asserts that the conduct of the trial judge constituted undue interference and deprived petitioner of a fair trial. Although, as petitioner notes (Pet. 24-25), the court questioned some of the witnesses, a reading of the passages relied upon reveals no prejudicial conduct on the part of the court. The questions posed to the government laboratory chemist were routine and designed to ascertain the relevancy and authenticity of exhibits offered in evidence (Tr. 79-82).[4] On another occasion, the court's questions were clearly for the purpose of enabling the court to determine a method for receiving certain evidence, in view of a defense objection; petitioner's counsel expressed agreement with the court's solution (Tr. 91-92).

The court's questioning of defense witnesses cannot fairly be interpreted as an attempt to "impeach" them. Questions asked of petitioner and his son were for clarification, or were requests for repetition of previous answers which the court had been unable to hear or understand. We note that the court also asked many similar questions of government witnesses (*e.g.*, Tr. 10-11, 16-19, 106-107, 126-127, 132, 145, 148-149, 167). Numerous defense objections were sustained during the trial (*e.g.*, Tr. 14, 15, 19, 21, 29, 30-31, 67, 146, 156, 176), while a number of government objections were overruled (*e.g.*, Tr. 59, 74-75, 274-

[4] The laboratory reports had previously been admitted into evidence, pursuant to stipulation (Tr. 8, 98-99).

275, 287-288). In addition, the court acceded to petitioner's untimely request for an additional laboratory analysis of the physical evidence, and granted a half-day recess for the purpose (Tr. 142-143). In sum, the court's conduct manifested impartiality and fairness to petitioner.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
JEROME M. FEIT,
JUDITH A. METZNER,
Attorneys.

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[5] Petitioner also complains that he was held in contempt for being fifteen minutes late for trial (Tr. 212-213). The record shows, however, that on an earlier occasion, petitioner had arrived forty-five minutes late because he "overslept" and "didn't feel too good." At that time, he was warned against further tardiness (Tr. 4-5). Under these circumstances, the imposition of a $50 fine for a second offense was neither arbitrary nor unjustified.